United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

Corrected

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff-Appellant,

-against-

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, et al.,

Defendants-Appellees.

BPS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, AND UPON
REMAND FROM THE SUPREME COURT OF THE UNITED STATES

REPLY BRIEF FOR DEFENDANTS-APPELLEES AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.

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November 13, 1979

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-7600

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Plaintiff-Appellant,

-against-

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REPLY BRIEF FOR DEFENDANTS-APPELLEES AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.

This reply brief is addressed to the brief of the United States as amicus curiae. It is the Government's main contention, contrary to the view of all parties, that further findings of fact are needed before the "rule of reason" issue

can be decided. We recognize the Government's interest in the outcome of this litigation, but we respectfully disagree that further findings are needed. There is no reason to delay appellate review -- and the conclusion of this litigation -- any longer.*

Although we disagree with the Government on that point, there is much in the Government's brief with which we do agree.

First, we agree with the Government that the District Court saw no need to examine all of the pro- and anti-competitive aspects of the blanket license precisely because CBS failed to prove any restraint (Br., pp. 9, 15)** -- when there is no restraint of trade, Sherman Act inquiry ceases.

We agree with the Government also that CBS' proposed "per use" system would be unlawful if the blanket license were unlawful (Br., p. 26 n.19).

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* If this Court should be of the view that additional findings of fact are required, the cases are clear that it should be the District Court -- not this Court -- which makes those findings. DeMarco v. United States, 415 U.S. 449, 450 & n.* (1974); Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 212 n.16 (8th Cir. 1974); United States v. O'Connell, 496 F.2d 1329, 1335 (2d Cir. 1974); Girard Trust Co. v. Windt, 178 F.2d 359, 360 (2d Cir. 1949).

** All references herein to "Br." refer to the "Brief for the United States as Amicus Curiae."

But we are in sharp disagreement on other issues where the Government depends not on the facts found in this case but on the most abstract and unrelated theory. Thus, the Government refers to the fact that the problems presented in this case are sui generis (Br., p. 16), but the Government immediately follows that correct observation with two suggestions that are simply wrong.

First, the Government suggests that " he most accurate" way to assess the legality of the blanket license in this sui generis situation

> "is to recognize the undisputed fact that the market reflects substantial deviations from the competitive norm. The thousands of music composers and publishers do not offer network users their works at prices subject to individual negotiation" (Br., pp. 16-17).

It is strange analysis, we submit, to appraise a sui generis situation by a "competitive norm."

Moreover, while we recognize that the Government has not read the record, one need not have read the record to know that all three courts in this case agree that music composers and publishers do offer network users their works at prices subject to individual negotiation. There have been no such individual negotiations only because the net-

works have always chosen to exercise their right to deal with ASCAP.

The Government sees another "deviation from the competitive norm" in that ASCAP network licenses have on occasion called for fees based on a percentage of advertising revenues. Under such agreements, of course, more successful networks pay more. But the Government ignores the fact that the consent decree calls for precisely such licenses and, more important, the networks have requested them. Further, the agreements now questioned by the Government have been worked out in proceedings under the Amended Final Judgment, where each network has had notice of what the others were paying, and the Government has had notice of each proceeding and each agreement.

Moreover, the right of access to the ASCAP repertory surely <u>is</u> worth more to a network which broadcasts to a large audience than the same right is worth to a network with a smaller audience. The Government seems to be saying that all who buy access to the ASCAP repertory should pay the same price. Perhaps CBS and the local tavern owner should pay the same price for most products -- say paper clips or light bulbs -- but access to the ASCAP repertory clearly has vastly different value to each. That, indeed, is one reason why this

case is sui generis. That is also why the consent decree requires that ASCAP not discriminate between licensees "similarly situated." The networks have never claimed that the decree has been violated. It is strange to find the Government first raising this question in this case at this time.

Perhaps the most extraordinary feature of the Government's brief is its statement that the ASCAP Amended Final Judgment is "not material to the antitrust analysis of the blanket licenses" (Br., p. 3 n.2). The Supreme Court, of course, thought the decree quite material, saying it is "a fact of economic and legal life in this industry," and pointing out that the decree balances economic power and the pro- and anti-competitive effects on the market, 99 S. Ct. at 1559 & n.24.

We submit that the consent decree and the other factors relied on by the Supreme Court in its analysis of the per se question are all material to a rule of reason analysis, but only after some restraint has been found. It remains our basic point that, for CBS, ASCAP is merely an option available if CBS elects to ask for an ASCAP license. On the record here, CBS does not need any ASCAP license because it can fully supply its music needs by direct dealings with ASCAP's members.

CONCLUSION

We respectfully submit the order below should be affirmed.

Respectfully submitted,

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